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SERIAL NUMBER	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.
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08/135,046 10/12/93 GARVIN

R

EXAMINER

CRANE, D

ART UNIT

PAPER NUMBER

6

3201

DATE MAILED:

05/11/95

ROBERT L. HARRINGTON
1515 S. W. 5TH
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C2M1/0511

This is a communication from the examiner in charge of your application.
COMMISSIONER OF PATENTS AND TRADEMARKS

☐ This application has been examined ☒ Responsive to communication filed on 02/21/95 ☐ This action is made final.

A shortened statutory period for response to this action is set to expire THREE month(s), _____ days from the date of this letter.
Failure to respond within the period for response will cause the application to become abandoned. 35 U.S.C. 133

Part I THE FOLLOWING ATTACHMENT(S) ARE PART OF THIS ACTION:

- ☒ Notice of References Cited by Examiner, PTO-892.
- ☐ Notice of Draftsman's Patent Drawing Review, PTO-948.
- ☐ Notice of Art Cited by Applicant, PTO-1449.
- ☐ Notice of Informal Patent Application, PTO-152.
- ☐ Information on How to Effect Drawing Changes, PTO-1474.
- ☐ _____

Part II SUMMARY OF ACTION

- ☒ Claims 1-6, 9 are pending in the application.
Of the above, claims _____ are withdrawn from consideration.
- ☒ Claims 7, 8, 10-12 have been cancelled.
- ☐ Claims _____ are allowed.
- ☒ Claims 1-6, 9 are rejected.
- ☐ Claims _____ are objected to.
- ☐ Claims _____ are subject to restriction or election requirement.
- ☐ This application has been filed with informal drawings under 37 C.F.R. 1.85 which are acceptable for examination purposes.
- ☐ Formal drawings are required in response to this Office action.
- ☐ The corrected or substitute drawings have been received on _____. Under 37 C.F.R. 1.84 these drawings are ☐ acceptable; ☐ not acceptable (see explanation or Notice of Draftsman's Patent Drawing Review, PTO-948).
- ☐ The proposed additional or substitute sheet(s) of drawings, filed on _____, has (have) been ☐ approved by the examiner; ☐ disapproved by the examiner (see explanation).
- ☐ The proposed drawing correction, filed _____, has been ☐ approved; ☐ disapproved (see explanation).
- ☐ Acknowledgement is made of the claim for priority under 35 U.S.C. 119. The certified copy has ☐ been received ☐ not been received ☐ been filed in parent application, serial no. _____; filed on _____.
- ☐ Since this application appears to be in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under Ex parte Quayle, 1935 C.D. 11; 453 O.G. 213.
- ☐ Other

EXAMINER'S ACTION

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STATUTE CITATION

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

REJECTION OF CLAIMS OVER PRIOR ART

Claims 1-5 are rejected under 35 U.S.C. § 103 as being unpatentable over Eggenmuller (3,687,061) in view of Meyer (5,269,829). The claimed method is substantially shown in Figures 10-13 of Eggenmuller with the exception of providing a perforated conduit which can be connected to a media source at the open end of the bag. Eggenmuller does show in the embodiment of Figures 1-4 at "conduit" 32 extending from the mouth of the tunnel at the open end of the bag "suitable (for) ventilation" (column 5, second to last paragraph). Accordingly, Meyer makes evident a "conduit" 32 for flowing a media source within the bagged contents. It would have been obvious to the skilled artisan at the time of applicant's invention to have modified Eggenmuller's by further providing the conduit 32 as depicted in the embodiment of Figures 1-4 as a perforated conduit to fully aerate the contents of the bag and to further provide perforations within the conduit as shown by Meyer. Since it is common in the grain drying art to "force" air within the contained grain to prevent spoilage of the grain, it would have been obvious to have connected the ventilating conduit 32 to a

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forced air source. As to claim 3, see Figure pipe 54 in Figure 10.

Claims 1-6 and 9 are rejected under 35 U.S.C. § 103 as being unpatentable over Cullen (5,345,744). Cullen's claimed invention is directed to the same claimed invention in that treatment of bagged contents is accomplished by a bag filling machine where a perforated conduit is fed through the bag filling machine as the bag is filled and deployed from the bag filling machine. Although the conflicting claims are not identical, they are not patentably distinct from each other because (1) the method claimed by applicants is an obvious method of treating bagged contents in the operation of the patented bagging machine and (2) the apparatus claimed by applicants is an obvious simplification of the patented bagging machine. Since the claims are considered obvious method procedures used by the claimed apparatus and broadened apparatus constructions of the claimed Cullen invention, an affidavit swearing behind the reference (as submitted by applicants) cannot be used to overcome the reference.

RESPONSE TO APPLICANTS' COMMENTS

Applicants have submitted a patent to Cullen, issued September 13, 1994, issued approximately eleven months from the

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filing date of applicants' application. In anticipation of the Cullen reference being applied against the claims under 35 UCS 102/103 applicants have submitted an Affidavit under 37 CFR 1.131 swearing back of the present application from the Cullen document. Applicants maintain that the claimed invention in the present application is not the same invention as claimed in the Cullen reference, therefore, the reason for the filing of the Affidavit.

However, the Cullen reference is a U.S. patent that substantially claims the rejected invention. An affidavit or declaration is inappropriate under 37 C.F.R. § 1.131(a) when the patent is claiming the same invention. The patent can only be overcome by establishing priority of invention through interference proceedings. See M.P.E.P. § 1101.02(g) for information on initiating interference proceedings. In accordance with MPEP 715.05:

"When the reference in question is a noncommonly owned patent claiming the same invention as applicant and its issue date is less than one year prior to the filing date of the application being examined, applicant's remedy, if any must be by way of 37 CFR 1.608 instead of 37 CFR 1.131."

Accordingly, the affidavit filed under 37 CFR 1.131 would not overcome the applicability of the Cullen reference in this situation. The examiner's basis for indicating interference is MPEP 2306 where:

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"The requirement that the claims of the application of the patent define the same patentable invention in order for an interference to exist does not mean that the application claim or claims must necessarily be identical to the corresponding claim or claims of the patent. All that is required under present practice is that a claim of the application be drawn to the same patentable invention as a claim of the patent. An application claim is considered to be drawn to the same patentable invention as a patent claim if it recites subject matter which is the same as (35 USC § 102) or obvious in view of (35 USC § 103), the subject matter recited in the patent claim, 37 CFR 1.601(n). The test is analogous to that applied for double patenting; i.e., if the applicant's claims would have been subject to a double patenting rejection of the "same invention" or "obviousness" type (see MPEP § 804) if the patent and application were by the same inventive entity, then the application and patent claim are directed to the same invention. In all cases, the examiner should keep in mind the fundamental principle that the issuance of two patents for inventions which are either identical to or not patentable distinct from each other must be avoided, *Aelony v. Arni*, 547 F.2d 566, 192 USPQ 486 (CCPA 1977)."

The above rejection of applicants' claims 1-6 and 9 over the Cullen reference is, therefore, based upon the position that applicants are claiming an invention which is "obvious" over the claimed invention set forth by Cullen. In accordance with MPEP practice, the following guidelines set out in MPEP 2308.01 are being used:

"If an applicant is claiming the same invention as a patent which has an earlier effective United States filing date but there is not a statutory bar against the application, and the applicant has not submitted the items required by 37 CFR 1.608(a) and (b), as appropriate, the application should be rejected under 35 USC 102(e)/103. A statement should be included in the rejection that the patent cannot be overcome by an affidavit or declaration under 37 CFR 1.131 but only

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through interference proceedings. Note, however, 35 USC 135(b) and MPEP 2307.02. The applicant should also be advised that an affidavit under 37 CFR 1.608(b) or evidence and an explanation under 37 CFR 1.608(b), as appropriate, must be submitted and it should be stated, if applicable, that the patentee has been accorded the benefit of an earlier U.S. application."

As to the applicability of the Eggenmuller and Meyer teachings against claims 1-5, as amended, the rejection is considered tenable. Eggenmuller clearly shows that the channel 32 is "permanently installed" and, thus, forms a permanent part of the bag. In this regard, the channel 32 extends along the bottom of the bag for the full length of the bag. This channel establishes a "conduit" for facilitating air flow. Method claims 1-5 do not preclude the permanently constructed channel as envisioned by Eggenmuller since the method steps encompass the formation of the channel as the as the bag is being deployed and filled. Thus, Eggenmuller's channel 32 is being "directed" from the machine and through the open end of the bag into the contents of the bag as the bag is being filled with contents, as set forth in claim 1. Therefore, it is maintained that claim 1 broadly describes the operation taught by Eggenmuller, as modified by Meyer.

INQUIRIES

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Examiner

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D. Crane whose telephone number is (703) 308-1870. The examiner's supervisor, Mr. J. Sipos, can be reached at (703) 308-1882.

Any inquiry of a general nature or relating to the status of this application should be directed to the Group receptionist whose telephone number is (703) 308-1148.

Documents related to the instant application may be submitted directly to Group 3200 by facsimile transmission at all times. Applicant(s) is(are) reminded to clearly mark any transmission as "DRAFT" if it is not to be considered as an official response. The Group 3200 Facsimile Center number is (703) 305-3579.

DCCrane (17W)
May 10, 1995



Daniel C. Crane
Primary Patent Examiner
Group Art Unit 3201